FILE COPY

Office - Supreme Court,
FILED
SEP 27 1948
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 101

MARK A. FREEMAN, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE PETITION FOR CERTIORARI.

THEODORE E. REIN,
10 S. LaSalle Street,
Chicago, Illinois.
PAUL B. CROMELIN,
FRANCIS C. BROOKE,
National Press Building,
Washington, D. C.,
Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX AND TABLE OF CASES.

Subject Index.

	Page
Introduction	1
Statement	1
Argument	7
Conclusion	21

Cases Cited.

Fontana v. United States, 262 F. 283, 286	12
Freeman v. United States, 146 F. 2d 978	9, 11
Hendry v. United States, 233 F. 5	11
Hirabayshi v. United States, 320 U. S. 81, 105	9
Krench v. United States, 42 F. 2d 354	11
Palmer v. Hoffman, 318 U. S. 109, 113-115	17
Pinkerton v. United States, 328 U. S. 640, 643	9
Semton v. United States, 332 U. S. 575	9, 10
United States v. Britton, 108 U. S. 199, 204	11
United States v. Noble, 155 F. 2d 315, 318	10

Statute Cited.

28 U.S.C.A. Sec. 695	16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No.

MARK A. FREEMAN, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE PETITION FOR CERTIORARI.

INTRODUCTION.

Because the Brief for the United States in Opposition is based on evident misapprehensions of both the factual and legal issues, a short reply is presented on behalf of petitioner.

STATEMENT.

The Statement in the Government's brief contains so many assertions unsupported by the record, and even contrary to the record, that correction is necessary.

1. In Footnote 3 at page 6, it is said that the public receipt holders must ultimately dispose of their holdings at maturity of the whiskey to a licensed bottling concern.

This is not true, because said receipt holders may hold the receipts after maturity, and may dispose of them to a licensed dealer, not necessarily a bottler, of which Consolidated was one.

2. Throughout the Government's brief appears a loose and inaccurate use of the word "guarantee". The witness Oldroyd, testifying for the Government, himself stated, at one of the pages referred to in the Government's brief (R. 115) that he "understood that the conditional contract * * * *was subject to revision and readjustment in accordance with the contract.*" At page 116 of the record, the same witness testified, "I did not understand the conditional trade acceptance by itself to be a guarantee of the payment of $70.00. * * * I know the conditional trade acceptance was not a guarantee so far as a legal document is concerned." The witness understood that the terms "revision" and "readjustment" was something which may be changed (R. 117). Oldroyd said, further, that Shields, the United States Attorney, who was one of the investors, "felt that there was an opportunity for him to get his money back, and *possibly a profit.*" (R. 116)

The record at pages 85 to 90, referred to by the Government, contains no mention of the use of the word "guarantee" or its equivalent. Similarly the record at page 116, also referred to, contains no support of the assertion that the customers were guaranteed a price. While the Government witness Wells loosely used the word "guarantee" (R. 169), his cross-examination (R. 181-182) discloses that the salesman told him he would receive about $8,000.00 to $8,200.00. He said that the petitioner, Freeman, "seemed to think" he would get a little more. He did not know what he was going to get per case. He said he "just tried to remember it as a lump sum." The same witness testified that when he talked to Freeman, *Freeman told him that the whiskey business "was highly speculative" and that the price he would get "would be governed by conditions as they prevailed at the time the whiskey was offered on the*

market" (R. 182). He said, further, "I think it was two or three times that I received word from Freeman in letters *that there was no guarantee* attached as to any amount I might actually receive". (R. 183) This, of course, is a complete refutation of the statement in the brief in opposition that petitioner knew that the salesmen were making promises guaranteeing any amount to be received by the customer. It is of the utmost importance to observe that the principal and lengthiest witness for the Government, Oldroyd, testified flatly as follows: "*Freeman called my attention to the fact that Consolidated Associates guaranteed no certain return.*" (R. 143)

3. At page 7 of the brief in opposition it is said that within the space of two months Consolidated "had difficulties with the Securities and Exchange Commission over the conditional trade acceptances." The record referred to in this connection, (R. 507) shows that the Securities and Exchange Commission advised Consolidated that the conditional trade acceptances *may be* construed as a security. The reference to page 675 of the record shows that petitioner was asked the direct question "After you had been advised by the Securities and Exchange Commission that that [the trade acceptance] was a security, you changed your plan, didn't you?" The answer was, "No, sir." When he was asked if "those things happened simultaneously", he answered "No, they did not."

4. At page 7 et seq. of the brief in opposition, it is said that the customers, after the abandonment of the conditional trade acceptance method of doing business, were approached with a new proposition; that they were told that their whiskies were of poor quality and difficult to bottle properly. So far as the record is concerned, this statement, if it was made, was true. Oldroyd admitted that the whiskey he had previously sold to his individual customers was inferior to Bernheim (R. 109), and that the market on it "had been depressed considerably" (R. 110). The Gov-

ernment asserts that the customers were told that Consolidated had acquired a large amount of Bernheim. This also was true, *the Government accountants themselves testifying that 11,669 barrels of whiskey had been paid for in full* (R. 312). As to the representation that Consolidated would bottle the Bernheim whiskey under the I. W. Harper label, the Court is respectfully referred to page 69 of petitioner's Petition and Brief where the testimony of witnesses upon the subject of the I. W. Harper representation is referred to with record references. None of the record references used by the Government in this connection sustains the statement in support of which they are cited.

5. While the reference to page 99 of the record, unexplained, might create an inference that Freeman had authorized one of his associates to represent that the Bernheim was to be sold under the I. W. Harper label, the witness's testimony on cross-examination completely refutes any supposition that Freeman was directly or indirectly the author of any such representation. The statement is as follows:

> "I stated to Garfield in Chicago substantially what I have just stated here, and he told me it would be bottled out as I. W. Harper. *I had been informed by Freeman prior to that time, by a letter under date of October 10th, that the whiskey was only to be bottled out as Old Switch.* As I recall it, October 10th was the date of the letter. I received it about a week or ten days later. That was my principal reason for coming to Chicago. I returned to Salt Lake City thereafter. When I was told by Garfield that the whiskey was to be bottled out as I. W. Harper, I had already been told by Freeman that it was to be bottled out as Old Switch. *That was an instance of my preferring to take Garfield's word against Freeman's.* I don't know of any special differences between Garfield and Freeman from time to time." (Italics supplied)

6. The Government asserts that petitioner made promises, when the power of attorney method of doing business was adopted, guaranteeing the amount the customers would receive, and fixing the fall of 1940 as the bottling date. Pages 92-93, 208-209, and 243 are cited in support of this assertion. The record at page 92 shows that Freeman told Oldroyd that the company had not guaranteed any return, that he knew promises had been made *as to the conditional trade acceptances* and he did not want them dissatisfied. Page 93 contains nothing whatsoever on the subject. Pages 208-209 of the record are likewise bare of any hint of any such promise on the part of petitioner. Page 243 does not even contain Freeman's name.

7. While there is no doubt that whiskey owned by the customers was hypothecated, which was well within the authority granted by the powers of attorney, it is also true, as has been said, that 11,669 barrels had been paid for in full (R. 312) and that the whiskey pledged was of vastly greater value than the amount of the loans, as is disclosed by the fact that the total indebtedness at the time of the close of business was approximately $340,000.00 and the whiskey was sold under the auctioneer's hammer for approximately $650,000.00.

8. The Government states that Consolidated disposed of the whiskey received in trades without loss (Gov. Br. 9), (as to which, of course, there can be no complaint). Except in two instances the exact amount received from the sale of such whiskey was accurately and immediately reported to the customer. In one of these instances, which is referred to by the Government as appearing at page 376 of the record, Consolidated made a profit of approximately $600.00, and in the other of these instances the customer's whiskey brought more than was reported, whereupon petitioner gave to the customer an additional barrel of Bernheim (R. 195). It is interesting to observe, in this connec-

tion, that the Bernheim whiskey traded to the customer in this instance was paid for in full and the warehouse receipts received (R. 376).

9. The Government, at page 10 of its brief, states that the customers were approached with a new proposal and advised to switch from Bernheim to younger whiskies to be used as blends. Omitted from the statement is the fact that when the customers were so approached, only 80 to 100 of the customers were interviewed (R. 585) and that it was suggested to them *either that Consolidated purchase the customer's receipts outright,* or for the customers to keep part of their Bernheim whiskey for use in the current production of a blended product (R. 586). It is said (Gov. Br. 10) that the customers were told that because of the new Federal tax the whiskey market was depressed and that it would not be profitable to bottle the Bernheim at that time. There is no contradiction of this fact in the record.

10. Throughout the statement of facts and in the argument, reference is made to the so-called "secret profit" made by Consolidated on the exchanges effected with the customers. Obviously there could be no secret profit since the customers were immediately advised as to the balances due from them, as the Government admits at page 9 of its brief.

11. At page 10 of the Government's brief, it is said that, despite its meager capitalization, Consolidated did a cash business of approximately $2,000,000 during its existence. This so-called cash business included not only transactions with customers under bottling contracts, but also the sale of whiskey to ordinary customers with no bottling arrangement (R. 515), a general brokerage business consisting of buying and selling as broker with brokers, and the purchase of whiskey of particular runs for particular concerns to bottle under their own labels (R. 529). Much of the amount

involved, therefore, did not represent a cash business in the sense that it involved the actual purchase and sale of whiskey.

12. A misleading statement is made when the Government asserts, at page 10 of its brief, that 31,000 barrels of whiskey was acquired from customers. At the following page of the brief, it appears that at the close of business Consolidated "owed" its customers 13,811 barrels of whiskey (R. 314) and that it had on hand, subject to an indebtedness, 14,194 barrels. It must be remembered, too, that the whiskey obtained from the customers was of inferior grades and of smaller value, than the whiskey traded to them by Consolidated. Mention of the indebtedness is made as being in the sum of $340,207.72. Omitted from the statement are the facts that the whiskey was sold at forced sale for $650,000. No consideration whatsoever is given to the circumstance that a large amount of money was owing to Consolidated by its customers and by taverns, restaurants, and other buyers at the time of the close of business (R. 383-384, 398, 399). The Government accountants did not take the value of these assets into consideration. Furthermore, Consolidated had a total of upwards of 600 customers. Only a portion of these investors held whiskey under the new bottling contracts (R. 514).

ARGUMENT.

In making numerical captions to the portions of the argument, the numbers are the same as those appearing in the Government's brief.

1.

For its first specification that sufficient evidence was adduced to warrant a conviction, the Government cites, at page 11 of its brief, "the tricky and dishonest 'power of attorney' under which the customer surrendered his warehouse receipt and received no definite promise in return".

The Government does not see fit to state in what respect the power of attorney was tricky or dishonest. Certainly failure to make a promise on the part of the attorney is not unusual in power of attorney forms. A power of attorney is a grant of authority, and ordinarily an agent makes no promises therein. The Government's complaint in this respect is inconsistent with the charge of its statement of facts that definite promises were made. Moreover, its use of an argument premising an evil intent on the power of attorney, coupled with its statement in its statement of facts at page 9 that "these forms were drawn up at petitioner's direction", highlights the contention made in the petitioner's brief (p. 39) that the refusal of the Court to admit his attorney's advice and direction with respect to the drawing of the power of attorney was prejudicial. The Government cannot now claim that such error was unprejudicial when it has in its brief in this Court attempted to draw such an inference from the power of attorney.

If the Court will examine the power of attorney itself, which appears in the appendix to Petitioner's Brief (p. 97), it will find that its provisions are straightforward, unambiguous and in no respect deceptive or tricky.

The assertion that the exhibits show that petitioner was repeatedly put on notice of the statements by his salesmen, and that he consistently evaded explanation is unsupported except by reference to two Government exhibits, 193 and 194. For the Court's information, copies of these exhibits have been reproduced and appear after the end of this brief. In no respect do they confirm the statement in support of which they are used.

The desultory argument of the Government on this point concludes with the statement that it is unnecessary in a prosecution for using the mails in furtherance of a scheme to defraud that all of the alleged false representations be proved. Petitioner's point on this application is that none of the alleged misrepresentations was proved to have been made by Freeman, or was authorized or permitted by him

to be made by any representative of Consolidated Associates. The Court's attention is respectfully redirected to point VIII of Petitioner's Brief at page 67 to 70, inclusive, wherein it appears that the Government failed in its proof as to the "lulling" payments charged in the indictment, that Government witnesses testified that there was no representation as to the prospective use of the I. W. Harper label, that petitioner repeatedly wrote to and told the customers, as well as the principal witness Oldroyd, that there was no guarantee, that the whiskey business was highly speculative, and that the price received would be governed by market conditions. In short, no answer is made to Petitioner's point VIII (p. 67).

2.

The second point of the Government's argument dealing with the trial and sentencing for both the substantive offenses and conspiracy admittedly fails to answer the contention, and attempts to excuse its failure by citing *Hirabayashi* v. *United States,* 320 U. S. 81, 105. This decision merely stands for the proposition that where one count of an indictment will support a sentence, an appellate court will not inquire as to whether the other count is good in law or has been properly proved. This has nothing to do with the legal issue presented by the petitioner's brief (Point II, p. 43). As this Court has said in *Pinkerton* v. *United States,* 328 U. S. 640, 643, "There are, of course, instances where a conspiracy charge may not be added to the substantive charge. One is where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime." *In that case this Court cited with evident approval Freeman* v. *United States,* 146 F. 2d 978, which the Government in its brief would have the Court disregard. In the *Pinkerton* case this Court applied the identity test, as was done in *Sealfon* v. *United States,* 332 U. S. 575, cited in the petitioner's brief. The

Government fails completely to make any attempt to meet the issue as to identity of offenses, and it must be presumed that it cannot do so. If the petitioner were lawfully convicted and sentenced for conspiracy, for which the maximum is two years, obviously to sentence him to a five year term is double punishment. Compare *United States* v. *Noble* (CCA 3) 155 F. 2d 315, 318.

The question of identity of offenses is concerned with both statutory definitions and with proof of facts. The sentencing of petitioner on the substantive offenses and the conspiracy charge making the sentences run concurrently cannot affect the error *in submitting the defendant to the jury on both classes of offenses.* The post-trial circumstance that the judge made the sentences run concurrently after verdict, was a matter of judicial discretion which cannot be regarded as decisive of the question, *should the defendant have been submitted to the jury on both classes of offenses.*

In the instant case the identity of the offenses as charged appears in the indictment itself, and the identity of the offenses as proved is demonstrated by the record. The question cannot be evaded by generalization. As this Court said in the *Sealfon* case, the answer to the question "depends upon the facts adduced at each trial and the instructions under which the jury arrived at its verdict at the first trial" (p. 579). The Court said, further, that the instructions under which the verdict was rendered must be set *in a practical frame* and "viewed with an eye to all the circumstances of the proceedings". (p. 579).

As the Court will see from the Government's brief, it is not contended that the evidence was not practically identical in proof of the substantive counts and the conspiracy count. There was no separation or allocation of the evidence during the trial or in the instructions. An examination of the indictment itself shows that the charging part of the conspiracy count alleges not only *the agreement to attempt to execute the scheme* by placing mail matter in the Post Office

establishment, but also "that the defendants in pursuance and furtherance of said unlawful combination * * * and to effect the object of the same" *did actually make the false representations* and "*did place or cause to be placed in the Post Office of the United States at Chicago * * * certain letters* * * * all as charged and alleged in Counts 1 to 28 inclusive herein preceding this count, by the means and in the manner set forth in each of these counts" (R. 63). Thus, the offense charged in the conspiracy count *is in all substantial respects a duplication of the offenses charged in the preceding substantive counts.* No authority need be cited in support of the proposition that the pleading of overt acts does not aid a defective indictment for conspiracy. (See *United States* v. *Britton,* 108 U. S. 199, 204.)

The instructions of the trial court to the jury, upon which this Court places importance in its decision in the *Sealfon* case, were, in the case at bar, completely confusing. The court spoke of the charges in the substantive counts as a conspiracy, and, belatedly instructing on a conspiracy count only by the vaguest of generalities, did not take the precaution to explain to the jury that the two offenses were separate and distinct, upon which separate sentences could be imposed.

In the conclusion of its brief, the Government asserts that there is no conflict of decision involved, but *in its footnote to page 12 of its brief, it is said that the Government does not agree with Freeman* v. *United States, 146 F. 2d 978 (CCA 6), an obvious admission of a conflict of authority.* No mention whatsoever is made of *Krench* v. *United States,* 42 F. 2d 354, or of *Hendry* v. *United States,* 233 F. 5. The question presented by this point of petitioner's application requires that, in the fair administration of justice, this question be finally determined by this Court.

3.

Attempt is made to answer petitioner's arguments as to the insufficiency of the indictment by the broad assertion that the particulars of the scheme need not be pleaded with

all the certainty as to time, place and circumstance requisite in charging the gist of the offense, which is the mailing of the letter or other article in attempted execution of the scheme. As is well known, 99% of the proof in a mail fraud case consists of evidence in support of the charge that the scheme itself was fraudulent. *The fraud appears in the scheme and not in the mailing.* The repeated assertions by this Court that indictments for serious offenses must charge with precision and certainty, and that "every ingredient of which it is composed must be accurately and clearly alleged" is brushed aside by the Government. None of the arguments contained in point IX of Petitioner's brief (page 72) is answered. It is contended that the matters of which petitioner complains fall "rather within the scope of a bill of particulars". That is not the point. Petitioner complains that there were thrown at him in the indictment, thirty-one charges of misrepresentation without any specification of time, place or circumstances, a procedure which was condemned in *Fontana* v. *United States,* 262 F. 283, 286 (Petitioner's Br. 74).

This Court, it is believed, should announce that it is not the purpose of the law to permit the prosecution to plead as little as possible, as indefinitely as possible, and wait for a motion on the part of defense for a bill of particulars. There would seem to be a duty in limine upon the prosecutor to state his cause of action.

4.

In point 4 of the Government's brief, which attempts to answer point I of petitioner's brief, there is manifest a complete misapprehension of the record. It is argued (Gov. Br. 14) that the Court permitted petitioner to introduce a considerable amount of evidence designed to show that a large competitor had taken active steps to defeat the bottling program, and that Consolidated's largest creditor (Klein) complicated the program by refusing to turn over the warehouse receipts except after endorsing them "without re-

course". Attempt is made to tell this Court that the trial judge did not eliminate evidence so admitted in his final charge to the jury. In this connection a disjointed and garbled version of the record is made. In a footnote (Footnote 7, page 15) counsel for the Government say that they think it clear from the quoted language (as quoted by them), that the Court *merely meant* to tell the jury that while they could consider the facts of interference with the bottling program, they were to exclude from consideration all details of Consolidated's collateral difficulties. The question is, not what the Court meant to tell the jury, but what the Court did tell the jury. The record takes the matter from the region of conjecture. The Court told the jury that the amount for which the whiskey had been sold at public auction, evidence of which had been admitted, *"in and of itself means nothing at all"*.

The Court also said to the jury in its final charge "Another matter *thrust before you* and argued to you concerns a controversy between Mr. Freeman and the owners of the I. W. Harper trade-mark or trade-name. *This is a matter entirely foreign to this suit,* and a limited amount of evidence was admitted concerning it only for the purpose of permitting Mr. Freeman to try to show his good faith in these transactions. Whether or not the I. W. Harper people interfered with the efforts of Mr. Freeman and his associates to sell Old Switch and the extent and character of that interference *is a side issue and a separate matter which could not* be *tried in this case.* If there was such interference, it may or may not be justified and it is not for us to pass on here." (R. 815)

The attorneys for the Government should not be permitted to attempt to sustain an erroneous judgment of conviction and an utterly inadequate decision by the Court of Appeals by arguments such as are addressed to this Court in the Government's brief.

The prosecution seeks cover in the statement that petitioner's intent to bottle was not necessarily crucial since

he could have been convicted on the evidence of the secret profits alone (Gov. Br. 15).

In the first place it is difficult, if not impossible, to find a charge of "secret profits" in the body of the indictment itself. The scheme charged, and the great bulk of the evidence introduced by the Government was deliberately calculated to convince the jury that the defendant's intent was to engage in a pretended bottling enterprise, the completion of which for the customer's advantage was not actually contemplated. This was the essence of the indictment and the burden of the Government's evidence.

As to whether or not, from an evidentiary standpoint, there was any "secret profit", the testimony of Government's witness Oldroyd knocks the Government's contention in this respect into a cocked hat. Oldroyd's testimony in this connection is conclusive. He said "I asked him [Freeman] if that was to be made on an even barrel-to-barrel basis, *and he said no, that would be based upon the then prevailing market price of the whiskey which had been owned by these people and Bernheim whiskey which was owned by Consolidated Associates.*" (R. 93.) At another point in the record Oldroyd said, "when the customer was going into that power of attorney transaction, I was told that it was to be traded on the present market value of the whiskey which was being turned over and the market value of Bernheim which was given him". (R. 123.) Oldroyd himself bought Bernheim whiskey at a wholesale or special price for his own purposes at $42.50 per barrel with the understanding that it was not to be sold in excess of $52.50 (R. 124). *There is no evidence whatsoever in the record that the price basis upon which whiskey was traded to the customer was excessive or unfair.*

The insufficient description, in the Government's brief, of the evidence excluded by the trial court requires that this Court be left in no doubt as to the nature and extent of the evidence so excluded. The court excluded:

1. The petition for reorganization;
2. The amount received from the sale of the assets;
3. The amount received by the customers as dividends;
4. The attempts to negotiate transactions which would insure the completion of the bottling program;
5. The outside resistance and interference exerted by a powerful competitor;
6. The testimony of Consolidated's sales manager as to the nature and extent of the unfair competition encountered;
7. The effect of the "without recourse" endorsement upon bottling plants where Freeman attempted to have the whiskey bottled (R. 757);
8. The testimony of one Goodman, a salesman for Consolidated who travelled over eight states, and who offered to testify as to the reception of Consolidated's product by wholesalers, the success of the sales, the interference with the sales, and his conversation with petitioner as to all of these factors (R. 454-455);
9. The testimony of one Salinger employed to qualify Consolidated's products in 17 states, who was not allowed to testify as to opposition encountered (R. 740);
10. The testimony of the Assistant United States District Attorney as to the complaint filed by Schenley against Consolidated, and as to the disproof of every element of such complaint after investigation by the District Attorney's Office (R. 772-778);
11. Petitioner's effort to stop the forced sale of the assets and his contention in the District Court in the reorganization proceedings that the whiskey actually belonged to the customers (R. 641);
12. Klein's attempt to acquire the whiskey;
13. Klein's connection with the Schenley interests (R. 610);
14. The advice of counsel obtained by petitioner in the drafting of the contracts with the customers;
15. The actual condition of Consolidated as shown by the schedules filed in the reorganization proceedings.

These and many other evidentiary factors, which any fair trier of facts would require in order intelligently to pass upon the question of guilt or innocence, were excluded.

5.

In point VI of Petitioner's brief, the authorities and the record were specifically pointed out to this Court in demonstration of the argument that the books and records of Consolidated were admitted in evidence without identification or foundation. It was explained that the statute (Title 28, U. S. C. A., Sec. 695), which is concerned with "entries", requires that it must appear that any entry so sought to be introduced in evidence must appear to have been made in the regular course of business, that it was the regular course of such business to make such entries, and that they were made at the time of, or within a reasonable time after, the event which they seek to record took place. Counsel for the Government make the flat statement that identification was made by an employee who testified that she worked on some of the books, that she was familiar with all of them, that they were kept in the regular course of business, and that the entries were made at or about the time of the entries recorded (Gov. Br. 14-16). In view of the record this statement is preposterous. The witness said that the total period of her employment was six months, that she worked only on bottling records, and upon those for only a fraction of the period involved. *She knew nothing of the entries in any other of the exhibits at any time,* and, obviously, she said she knew nothing about what transpired after she left the company's employ. The trial judge, at one point, said that it was not intended to prove entries, but merely to prove books (R. 287, 288) and said that it did not make any difference whether the witness had knowledge of the entries on the books or not (R. 302), and that she could not be expected to know anything of her own knowledge when she was not there (R. 330).

No better example of the bias of the trial judge is revealed than in his effort to make good his erroneous admission of this documentary evidence. *Completely apprised of the lack of knowledge of the witness, the trial judge, nevertheless, himself went on to ask her, "Were the entries made in these books * * * made at or about the time transactions reflected thereon occurred"* (R. 285). He asked the witness, also, "You saw other entries made, didn't you, by other people?" When she answered in the affirmative, the Court asked, "Were they made correctly when they were made?" (R. 299).

The trial court flagrantly disregarded, and the Court of Appeals disregarded, and the Government in its present brief disregards, the statute and the decision of this Court in *Palmer* v. *Hoffman*, 318 U.S. 109, 113-115, cited at page 152 of petitioner's brief. Petitioner's objections do not go to the "weight" to be accorded to the evidence, as the Government contends, but go to the very basis of admissibility.

6.

As in other points of the Government's brief, its point 6 makes no attempt to answer petitioner's point IV as to the admissibility of the testimony of Post Office Inspector Sugg, except to say that the evidence was relevant on the ground that it constituted an admission against interest on petitioner's part. The record to which the Government alludes as statements made by the petitioner to the inspector, relative to complaints filed with the Post Office Department, *contains nothing in the nature of an admission.* At page 429 of the record it appears that the Inspector told Freeman that he had a complaint about a transaction with one of the customers. Freeman knew nothing about it and called in the man who handled the transaction (R. 429-430). At page 431 of the record it again appears that the Inspector told Freeman he had another complaint and here, again, Freeman said nothing in the nature of an admission (R.

431-432). What actually happened was that the Inspector got before the jury the fact that complaints were made, not necessarily even to him, but to the Post Office Department, and if this isn't hearsay nothing is. On the face of it, the statement that customers had made complaints was necessarily damaging and dangerous and highly prejudicial evidence.

7.

In Government's point 7 (Gov. Br. 17) it is admitted that there was an occasional severity to defense counsel. But, it is said, the trial judge was "sorely tried by their conduct". *It is significant that no record reference is cited in support of this assertion.* When, where and how did any defense counsel sorely try the judge during the course of the trial? Certainly, the remark of one of counsel for the defense in his final argument cannot justify all of the events demonstrating judicial bias and prejudice which occurred before that time.

The Government fails to excuse the unjudicial acts described in Petitioner's Brief (Br. 55 et seq.) which culminated in the unprecedented and revengeful action of the court in striking from the record evidence bearing on the vital question of intent which he had previously, albeit reluctantly, admitted.

The Government attempts to justify the court's attitude by stating that despite the agreement to prevent unnecessary objections, defense counsel repeatedly interposed objections. For evidence of the agreement it cites the record —pages 77-80. Examination of these pages discloses that there was no agreement of any kind with respect to objections. The agreement merely was (which the rules now allow anyhow) that no *exceptions* would have to be made to the court's rulings. The other excuse for the court's hostile attitude is that despite the court's clear rulings, defense counsel never ceased in their efforts to get before the jury the details of the Klein and Schenley affairs and

the bankruptcy proceedings. It is a strange commentary upon the standards of judicial conduct that a litigant shall suffer because his counsel and the court disagree as to the materiality of evidence. *A fortiari,* where the evidence sought to be admitted was admissible, counsel's insistence upon his rights is no excuse for prejudice and bias by the judge. It is difficult to reconcile the Government's statement on page 17 of its brief, with respect to the court's so-called repeated and clear rulings respecting the Klein and Schenley affairs and the bankruptcy proceedings, with its contention on page 14 that the court permitted these matters to be brought before the jury for its consideration. Evidently extended persuasion must have been necessary. *The Court of Appeals failed utterly to give any consideration to this subject.*

8.

In point 8 of its brief, the Government asserts that no prejudice resulted to petitioner, since prompt apology was made and the jury instructed three times to ignore the prosecutor's vicious statement that petitioner duped the investors, and that he was a liar, a thief, a confidence man, and an old hand at the game. This language might be expected in a police court, but, since the frequent admonitions to prosecutors by this and other courts, arguments of such desperate nature are now seldom encountered. When counsel say that all of these statements, except one, were within the evidence, they mean, evidently, that petitioner was a liar, and a thief, and a confidence man. There is no evidence in this record that petitioner lied. There is no evidence that he was a thief and there was no evidence that he was a confidence man. Everything in the record points to the contrary.

The so-called apology made by the prosecutor was contained in the language "I am sorry, Counsel. I didn't mean it" (R. 793). This statement referred to only one of his

assertions to the effect that the defendants were old hands at the game. In no manner did he apologize for calling petitioner a thief, a liar, or a confidence man.

Upon objection by petitioner's counsel, the court merely said "The jury will disregard *that evidence*". There was no such evidence. The court went on to say, "I am saying that remark will be disregarded—there is no evidence of any other events—" (R. 793). At page 794 of the record, it appears that the court said "Ladies and gentlemen, Mr. Miller made *a remark* to which exception was taken which I instructed you to disregard. I want you to know I meant what I said. You are to disregard that remark. It has no part in the trial of this case." Mr. Miller did not make one remark, but a number of them, and the court did not specify which of the statements he was instructing the jury to disregard.

Again at page 813 of the record, the court called attention to "Mr. Miller's remark yesterday about some of these defendants". He said this was improper, uncalled for, and could have the effect of being prejudicial. He said "I instruct you to disregard those remarks. *I trust you will be able to do so and you will do so.*" Again there was no specification as to what remarks the court was alluding. And this last advice to the jury was but a prelude to the devastating charge to the jury following defense counsel's statement that "the search for the truth still fails".

Under the circumstances there was no adequate correction of the evil results which must necessarily follow an argument of a public prosecutor whose official position a jury is always prone to respect.

The Government's Brief, page 18, attempts to excuse the statements by saying that, with the exception of the characterization of Freeman as an "old hand at the game", the statements were within the evidence and therefore not improper. Such a strong factual statement calls for a citation of the record. That the Government has been unable to make any citation of evidence to the effect that petitioner

was either a thief or a confidence man is a practical concession that there was no such evidence.

9.

The Petition and Brief herein point out the inadequacies, the confusion and other error in the trial court's charge to the jury. Plainly the Circuit Court of Appeals did not pass on these deficiencies. The Government, here, does not see fit to answer any specific one of them. Hence no reply is necessary.

CONCLUSION.

The opinion of the Circuit Court of Appeals furnishes within itself no guide to this Court in determining whether the affirmance of the judgment of conviction was right or wrong. The Government's brief makes no attempt worthy of the name to support either the judgment of the District Court or the cavalier dismissal of petitioner's contentions by the inadequate, confusing and sometimes incomprehensible opinion of the Circuit Court of Appeals.

Running through the petition for certiorari and the brief in support of the petition is the theme that the petitioner was deprived of his right of consideration by an appellate court of the errors which transpired in the trial court. A mere perusal of the opinion of the Circuit Court of Appeals discloses a summary dismissal of serious charges of error. The Government at no point attempts to show that this petitioner received proper consideration at the hands of the Circuit Court of Appeals.

It is the summary disposal of an appeal in an important case, fairly presented and seriously argued, which compelled the filing of the instant petition. In full legal effect, failure to issue the writ of certiorari will result in the deprivation of petitioner's right to have his case adequately reviewed. It is inconceivable that a large portion

of a defendant's life can be sliced from his existence under the unfortunate judicial policy that after all this is only another criminal case.

It is again earnestly urged that the writ of certiorari issue and that this court consider the questions presented.

Respectfully submitted,

THEODORE E. REIN,
10 S. LaSalle Street,
Chicago, Illinois.
PAUL B. CROMELIN,
FRANCIS C. BROOKE,
National Press Building,
Washington, D. C.,
Counsel for Petitioner.

EDWARD J. SCHAUF, D. D. S.
SUITE 302, MAJESTIC BLDG.
QUINCY, ILL.

CONS. ASSO. INC.
RECEIVED
DEC 23 1939
For

Consolidated Associates Inc.
620 N Michigan Ave
Chicago Ill.

Att: Mr Mark A. Freeman.

Dear Sir:

When I made an exchange on some whiskey a few months ago and also purchased 36 additional bbls of Bernheim at $50.00 per barrel from your Mr K. Lang, he showed me a pint bottle of I. W. Harper whiskey, it retails at $1.49 a pint here in Quincy and told me that is what I would be buying from him, and he assured me a price of $24.50 a case, which would make me a very nice profit. Now in my contract I noticed that I am to buy I. W. Harper Whiskey and nothing is said about price except you are to get [illegible] of what price the whiskey is sold at.

Apparently Mr Lang has misrepresented to me what I am supposed to receive. So I want a new contract showing this whiskey is to be bottled under the I.W. Harper label as was represented to me and a price of at least $21.00 per case or I want my Warehouse Receipts for 100 bbls of Bernheim fall of 1936, as I am not going to pay you $1.50 a case about $1900.00 commission on this transaction and me be left holding the bag, I can sell this whiskey at $1.00 a barrell commission and you be to secure about $19.00 a barrel commision, no, can't be done, I want what was represented to me or I want my receipts.

Yours truly
Edward J Schauf

Defendants Exhibit
Comm. Exhibit 193
In the District Court of the United States, for the Northern District of Illinois
Case Edward Neulander - Official Court Reporter
( ) Ident. ( ) Rec'd.

CONSOLIDATED ASSOCIATES, INC.
620 NORTH MICHIGAN AVENUE
CHICAGO, ILLINOIS

DECEMBER 29, 1939

DR. EDWARD J. SCHAUF
SUITE 302, MAJESTIC BLDG.
QUINCY, ILLINOIS

DEAR DR. SCHAUF:

WE ARE CARRYING FOR YOUR ACCOUNT WAREHOUSE RECEIPTS COVERING ONE HUNDRED (100) BARRELS OF WHISKEY-IN-BOND, DISTILLED BY BERNHEIM DISTILLING COMPANY, LOUISVILLE, KENTUCKY, SERIAL NUMBERS UNDER DATES OF AUGUST 24, 1935, AND OCTOBER 17, 1939, AND SUBJECT TO THE TERMS OF OUR POWERS OF ATTORNEY NO. C-2628 AND D-5252, COPIES OF WHICH YOU HAVE IN YOUR POSSESSION.

WE HEREWITH BEG TO ADVISE YOU THAT THE CASE GOODS THAT WILL COME OUT OF THIS 100 BARRELS OF BERNHEIM WILL NOT BE SOLD BEFORE SUBMITTING TO YOU THE PRICE AT WHICH SAME MAY BE DISPOSED OF. IF, FOR ANY REASON, YOU SHOULD NOT DESIRE TO SELL AT THE PRICE MENTIONED, WE WILL DELIVER TO YOU, SUBJECT TO THE TERMS OF THE ABOVE NUMBERED POWERS OF ATTORNEY, THE WAREHOUSE RECEIPTS COVERING SAID GOODS.

TRUSTING THIS IS THE INFORMATION YOU DESIRE, AND ASSURING YOU OF OUR WILLINGNESS TO COOPERATE WITH YOU IN EVERY POSSIBLE MANNER, WE ARE

YOURS VERY TRULY,

CONSOLIDATED ASSOCIATES, INC.

Commonwealth's Exhibit 194 Defendants Exhibit
In the District Court of the United States, for the Northern District of Illinois
Case
Identified Rec'd.
Edward Neylander - Official Court Reporter
MAF

E.J.S.
8-6-41